IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7382 OF 2005

Bhikoba Deora Gaikwad & Ors. ... Petitioners

Versus

Hirabai Marutirao Ghogare & Ors. ... Respondents

Shri Amol Deshpande and Shri P.B.Shaligram for the Petitioners.
Shri Uday Warunjikar for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : FEBRUARY 12, 2007.

P.C.:

1. Submissions of the Advocate appearing for the Petitioners and Advocate appearing for the Respondents were heard on the last date. The challenge in this Petition under Article 227 of the Constitution of India is to the order dated 27th September, 2005 passed by the learned Civil Judge, Junior Division, Indapur in Regular Darkhast No.34 of 2002. The Petitioners are the original Defendants in a suit filed by the first Respondent. A decree of Partition and separate possession of immovable property was passed by the trial Court which was put to execution by the first Respondent by filing Regular Darkhast No.34 of 2002. Earlier some of the Petitioners had taken out Applications at Exhibit 12 and Exhibit 30 in the execution Application. Application at Exhibit 12 was filed on the ground that the execution Application was barred by limitation as

the same was filed 12 years after the date of decree. This Application at Exhibit 30 was for stay of execution of the decree. The said Applications were rejected by the trial Court. The order of the trial Court was challenged by filing Writ Petition No.5943 of 2003. By judgment and order dated 28th February, 2005 order passed by the trial Court on the said Applications was confirmed. Thereafter, the present Petitioners filed Applications at Exhibit 40, 41, 46 and 50 which have been decided by the impugned order dated 27th September, 2005 by rejecting the same.

2. The only submission of the learned counsel appearing for the Petitioner is that the execution Application was filed after lapse of period of 12 years from the date of the decree and therefore, it was barred by limitation. He placed reliance on the decision of the Apex Court in the case of Hameed Joharan (Dead) and others Vs. Abdul Salam (Dead) By Legal Representatives & others [(2001) 7 Supreme Court Cases 573). He also relied upon another decision of the Apex Court in the case of Dr.Chiranji Lal (D) by L.Rs. Vs. Hari Das (D) by L.Rs. (2005 AIR Supreme Court page 2564).

3. I have considered the submissions made by the Advocate for the Petitioners. In the present case the

decree has been passed in respect of lands which are assessed to payment of land revenue and therefore, the decree directs further proceedings to be taken in accordance with section 54 of the Code of Civil Procedure, 1908. The learned Counsel for the original decree holder placed reliance on decision of the learned single Judge of this court in the case of Annasaheb Rajaram Nagane & Another Vs. Rajaram Maruti Nagane & Others (AIR 2001 Bombay 303). The learned single Judge held that as regards decree for partition in respect of property assessed for payment of land revenue, an Application made to the court to send the decree and papers to the Collector for the purposes of effecting partition as required by section 54 of the said Code cannot be treated as an Application for execution and therefore, the provisions of Limitation Act, 1963 will not apply to such Application. In paragraph No.24, this Court held thus:

> "An application even if made in the form of Darkhast application with a prayer to send decree and papers to the Collector, was not an application in execution. It did not attract provisions of Limitation act. At no point of time executable final decree took birth, so as to attract the provisions of Limitation Act.

> Therefore, the impugned order passed by the executing Court holding that the execution application was barred by limitation is bad and illegal and suffers from material illegality and irregularity, as such".

In the decisions of the Apex Court relied upon by the Petitioners, the issue decided by this Court in the case of Annasaheb (supra) did not arise for consideration. In view of clear pronouncement of the law by the learned single Judge in the case of Annasaheb (Supra), there is no merit in the submission made by the Advocate for the Petitioners.

4. It must be noted here that in earlier Application at Exhibit 12 the same issue of limitation was raised. The said Application was rejected by the trial Court. By order dated 28th February, 2005 in Writ Petition No.5943 of 2003, the said order has been affirmed by this court. While affirming the order, a liberty was granted to the Petitioners therein to take out appropriate application for correction of precepts. Infact, in view of the decision of the learned single Judge in Writ Petition No.5943 of 2003 it was not open for the Petitioners to agitate the issue of bar of limitation. There is no merit in the Petition and the

same is rejected.

Judge.